



Net Operating Losses (NOLs) and Post Allocation Net Operating Losses (PNOLs) with Certain Mergers & Acquisitions

TB-102(R) - Revised April 20, 2023

Tax: Corporation Business Tax

Revision Information: This Technical Bulletin was revised to include references to the [promulgated rules](#).

Beginning with tax year 2019, New Jersey mandated combined reporting. P.L. 2020, c. 118 (Chapter 118), which was signed into law on November 4, 2020, made a series of technical corrections, clarifications, and changes to the Corporation Business Tax Act. This Technical Bulletin discusses the impact of the amendments on mergers and acquisitions in the context of Prior Net Operating Loss Conversion Carryovers (PNOLs) and the new post-allocation net operating losses and post-allocation net operating loss carryovers (NOLs) as a result of N.J.S.A. 54:10A-4.5(b).

Prior to enactment of P.L. 2018, c. 48, P.L. 2018, c. 131, and P.L. 2020, c. 118, net operating losses and net operating loss carryovers of a non-surviving entity generally would have not survived a merger or acquisition pursuant to N.J.S.A. 54:10A-4.5; N.J.S.A. 54:10A-4(k)(6)(D); N.J.A.C. 18:7-5.13; and *Richard's Auto City v. Dir.*, NJ S. Ct., (1995) 659 A.2d 1360.

As a result of P.L. 2018, c. 48 and P.L. 2018, c. 131, subsection b was added to N.J.S.A. 54:10A-4.5, which stated: "Subsection a. of this section shall not apply between members of a combined group reported on a combined return in New Jersey, or between members of a commonly owned group reported on the elective combined return in New Jersey." The result was that PNOLs and NOLs survived the mergers between group members. However, the statute was ambiguous with regard to mergers and acquisitions between separate return filers or separate combined groups.

Chapter 118 amended the statute. N.J.S.A. 54:10A-4.5 in relevant part states:

- a. Notwithstanding any provision of subsection (k) of section 4 of P.L.1945, c.162 (C.54:10A-4) or of the federal Internal Revenue Code, including but not limited to 26 U.S.C. s.381 or any successor or equivalent provision, that permits a corporation to use the net operating losses of another for federal income tax purposes following certain transactions, including but not limited to those qualifying as reorganizations under the provisions of subparagraph (A), (C), (D), (F) or (G) of paragraph (1) of subsection (a) of section 368 of the federal Internal Revenue Code, 26 U.S.C. s.368, a net operating loss for a privilege period ending after June 30, 1984, may be carried over and allowed as a deduction only by the corporation that sustained the loss; provided, however, that in the case of a merger of two or more corporations pursuant to statute of this State or any other jurisdiction, the net operating loss may be carried over only by the corporation that sustained the loss and that is also the surviving corporation following the merger. The net operating loss may not be carried over by a taxpayer that changes its state of incorporation.
- b. Subsection a. of this section shall not apply: (1) between members of a combined group reported on a combined return in New Jersey, or (2) between members of an affiliated group reported on the elective combined return in New Jersey, or (3) if corporations that were parties to the merger would be members of the combined group reported on a combined return in New Jersey within one group privilege period subsequent to the date of the merger, unless there is an unforeseen delay due to required approvals from federal or other state regulatory authorities that delays the finality of the merger or acquisition. In a situation where there is delay due to the regulatory approval requirements of federal or other state regulatory authorities, the corporations may petition the director, in a form and manner prescribed by the director, documenting that the corporations' plan

to be a combined group filing a New Jersey combined return upon approval of the merger or acquisition by the federal or other state regulatory authorities. Within 180 days of approval by the federal or other state regulatory authorities of the merger or acquisition, the corporations shall notify the Division of Taxation of the approval and the director shall issue a stamped certificate of attestation attesting that the net operating loss carryovers are not extinguished. The provisions of this paragraph (3) shall only apply to mergers and acquisitions occurring on or after the effective date of P.L. 2020, c. 118 (C.54:10A-5.46 et al.) and shall not apply to a binding agreement in effect prior to the effective date of P.L. 2020, c. 118 (C.54:10A-5.46 et al.).*

* Meaning the provision only applies to mergers and acquisitions that closed on or after the date that Chapter 118 was signed into law (November 4, 2020).

For mergers entered into for privilege periods ending on and after July 31, 2019, and entered into before November 4, 2020 – For mergers and acquisitions between members of a group that already file a New Jersey combined return together, PNOLs and NOLs survive the merger or acquisition. For mergers and acquisitions involving entities that had not previously filed a New Jersey combined return together, PNOLs and NOLs may survive post-merger/acquisition depending on the facts and circumstances and whether the corporations (or separate combined groups) subsequently file a New Jersey combined return together.

For mergers and acquisitions occurring on or after November 4, 2020 – PNOLs and NOLs survive the merger or acquisition if the parties to the merger or acquisition are, or will be, members of the combined group reported on a New Jersey combined return within the first group privilege period subsequent to the date of the merger. This means that if there is a merger or acquisition in Year 1 between two corporations (or two combined groups) that had not previously filed New Jersey combined returns together, the corporations/combined groups must file a New Jersey combined return together no later than for the Year 2 privilege period in order for the PNOLs and NOLs to survive the merger or acquisition.

Regulatory Delay Situations. N.J.S.A. 54:10A-4.5(b)(3) provides a procedure for situations where there is delay in the approval requirements by federal or state regulatory authorities (other than the Division of Taxation). In such situations, the corporations must notify the Director documenting that the corporations' plan to be a combined group filing a New Jersey combined return upon approval of the merger or acquisition by the federal or state regulatory authorities. Once the acquisition of merger is approved by the federal or other state regulatory authorities, the corporation has 180 days to notify the Division of Taxation of the approval. Then, the Director will issue a stamped certificate attesting that the PNOLs and NOLs are not extinguished. Only certificates with the raised seal of the Director of the Division of Taxation are valid approved certificates.

To satisfy the notification requirements and to receive the stamped certificate of attestation attesting that the PNOLs and NOLs are not extinguished please contact:

New Jersey Division of Taxation
Grants & Credits Unit
PO Box 269
Trenton NJ 08695-0269

Promulgated Rules. For additional information, see N.J.A.C. 18:7-5.14; N.J.A.C. 18:7-5.21; N.J.A.C. 18:7-21.10; N.J.A.C. 18:7-21.11; and N.J.A.C. 18:7-21.27..

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